Supreme Court, U.S.
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No. 97-191

In The

Supreme Court of the United States

October Term, 1996

NANCY PRESCOTT,

Petitioner,

vs.

G.I.W. INDUSTRIES, INC. and KSB AMERICA COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT O. SANDS
Counsel of Record
C. GARNER SANFORD, JR.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Attorneys for Respondents
1201 West Peachtree Street, N.W.
Suite 3800
Atlanta, Georgia 30309
(404) 881-1300

71890 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. Should the Supreme Court grant certiorari to consider whether the district court, as affirmed *per curiam* by the Eleventh Circuit, properly interpreted the unambiguous language of the Worksharing Agreement proffered into evidence by Petitioner in opposing a summary judgment motion.

2. Should the Supreme Court grant certiorari to review the Eleventh Circuit's determination that the district court did not abuse its discretion in denying Petitioner's motion for reconsideration, which was based on evidence that was available to Petitioner at the summary judgment stage and which evidence was offered to contradict the Worksharing Agreement that Petitioner proffered into evidence and relied on in opposing summary judgment.

3. Whether the Supreme Court should grant certiorari to consider Petitioner's "electronic filing" theory and "equitable tolling" argument even though Petitioner did not present these issues to the district court and the Eleventh Circuit declined to address these issues for the first time on appeal.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties are listed in the caption of this case. The following are parent companies, nonwholly owned subsidiaries, and affiliates of GIW Industries, Inc. or KSB America Company:

KSB AG
Klein Pumpen GmbH
PAB Pumpen-uno-Armaturen-Beteiligungsgesell Schaft GmbH

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STATEMENT OF THE CASE

A. Introduction

The dispositive facts and legal principles in this action are not complicated and are well settled. Petitioner, Prescott, commenced this action alleging that GIW Industries, Inc. ("GIW"), her previous employer, discriminated against her because of her gender, female, in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). The decisions of the courts below and the issues on which Prescott now seeks a Writ of Certiorari focus on whether Prescott filed with the Equal Employment Opportunity Commission ("EEOC") a timely charge of discrimination, which is a statutory prerequisite to this Title VII action. The district court entered summary judgment against Prescott on this issue and ordered this action dismissed, and thereafter denied Prescott's motion for reconsideration on the same issue. The Eleventh Circuit affirmed, *per curiam*, the decisions of the district court.

B. Statement of Facts

GIW, located in Columbia County, Georgia, employed Prescott in August 1976, and Prescott remained employed by GIW in Columbia County, Georgia until she was terminated on March 25, 1994. (R1-1, ¶ 9; R1-11, Prescott Tr. pp. 71-72).[1] In spite of admissions in her deposition to the contrary, Prescott insinuated to the courts below and now in the Petition that she may have been terminated as late as March 28, 1994. (Petition, p. 2). Prescott admits, however, that this alleged dispute is

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1. Prescott's deposition transcript is cited herein as "Prescott" followed by applicable page numbers of the deposition transcript. Cited pages of Prescott's deposition transcript are attached to the Memorandum in Support of Defendant's Motion for Summary Judgment, which is indexed in the district court record as Document R1-13.

immaterial to the timeliness of her charge in this action. (R1-15, Plaintiff's Response to Material Fact No. 6).

Prescott has never been an employee of KSB America Company ("KSB"), and Prescott does not allege any employment relationship with KSB. (Prescott Tr. p. 72). Rather, Prescott's sole basis for naming KSB as a defendant in this action is because of KSB's ownership of stock in GIW. (Prescott Tr. pp. 71-72). Prescott does not dispute that she has never filed a charge of discrimination against KSB. (R1-15, Plaintiff's Response to Material Fact Nos. 11-12).

Plaintiff's written charge of discrimination was filed with the EEOC in its Atlanta District Office and stamped received on September 28, 1994. (R1-15, Plaintiff's Response to Material Fact No. 10; Prescott Tr. P. 217). Accordingly, EEOC received Prescott's charge of discrimination 186 days after her termination date of March 25, 1994. Even if Prescott were able to establish a termination date as late as March 28, 1994, the date she filed her charge with the EEOC would still not be within the 180-day limitations period mandated by Title VII.

In an effort to establish a timely charge, Prescott tried to utilize a charge of discrimination that she allegedly filed with the Richmond County Human Relations Commission ("RCHRC") within 180 days of her termination.[2] RCHRC is a local fair employment practices agency created by the Board of Commissioners of Richmond County, Georgia to administer an ordinance prohibiting certain employment discrimination within the territorial boundaries of Richmond County, Georgia. (Appendix to Petition p. 19). As discussed above, however, Prescott was employed by GIW and was terminated in Columbia County, Georgia and she does not allege in this action any

2. RCHRC is not a deferral agency in this action because Prescott was not employed in Richmond County, Georgia.

employment discrimination arising in Richmond County, Georgia. RCHRC has no jurisdiction over employment practices occurring in Columbia County, Georgia. (Appendix to Petition p. 19; Prescott Brief p. 6; Respondents' Appendix p. 2a; EEOC Amicus Brief p. 4).[3] It is undisputed that Prescott was represented by counsel when her charge was filed. (Prescott Tr. pp. 215-16; R1-15; Plaintiff's Response to Material Fact No. 8). In fact, Prescott's counsel specifically handled the filing of her charge of discrimination. (*Id.*).

1. *The Motion for Summary Judgment*

On January 11, 1996, GIW and KSB filed a timely motion for summary judgment arguing that Prescott's claims were barred by her failure to file with the EEOC a timely charge of discrimination. (R1-10; R1-11). Prescott opposed this motion for summary judgment by proffering a Worksharing Agreement between EEOC and RCHRC in an attempt to establish that RCHRC was EEOC's agent for purposes of receiving her charge of discrimination arising out of Columbia County, Georgia. (R1-14; Appendix to Petition p. 3). Prescott argued that because of this alleged agency relationship, her charge should be deemed filed with EEOC as of the date Prescott's charge was filed with RCHRC. Prescott did not argue to the district court that the Worksharing Agreement she proffered and relied on was in any way ambiguous. Furthermore, in her brief to the Eleventh Circuit, Prescott admitted that "from plaintiff's perspective the language of the agreement was unambiguous . . ." (Prescott Brief, p. 23; Respondents' Appendix p. 3a).

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3. Prescott's brief to the Eleventh Circuit is cited herein as "Prescott Brief" followed by relevant page numbers. Cited pages that are particularly pertinent are included in Respondents' Appendix to this brief in opposition. EEOC's Amicus Brief to the Eleventh Circuit is cited herein as "EEOC Amicus Brief" followed by relevant page numbers.

On March 20, 1996, the district court entered an order granting summary judgment against plaintiff's claims, finding that Prescott's EEOC charge was untimely. (R1-23; Appendix to Petition p. 3). In framing the issue presented by Prescott through introduction of the Worksharing Agreement, the district court stated as follows:

> The central issue presented by plaintiff in this case is a simple question of agency: Does the RCHRC have the authority to accept charges on behalf of the EEOC based upon discriminatory acts occurring outside of Richmond County?

(R1-23; Appendix to Petition p. 3). The court then examined the language of the Worksharing Agreement proferred on this issue by Prescott and concluded as follows:

> By its own terms, the Agreement relied upon by Plaintiff to establish the RCHRC as an agent of the EEOC only contemplates an agency relationship with regard to employment practices occurring within Richmond County, Georgia.

(R1-23; Appendix to Petition p. 4). The district court, therefore, concluded that Prescott failed to offer evidence that she had filed with the EEOC a charge of discrimination prior to September 28, 1994, which is after the 180-day limitations period expired. The district court did not identify or rule on any other issue in granting summary judgment against Prescott. (R1-23; Appendix to Petition pp. 1-4).

2. *The Motion for Reconsideration*

On April 3, 1996, Prescott filed with the district court a motion for reconsideration of the order granting summary judgment.[4] (R1-25).[5] Prescott's Motion for Reconsideration reiterated her agency argument based on the Worksharing Agreement. (R1-25, pp. 2-4). At this stage, however, Prescott attempted to offer affidavits from RCHRC to contradict the language of the agreement introduced by plaintiff and relied on by the district court in granting summary judgment. (R1-25, declarations of John P. Batson, Frank Thomas and Sheryl Jones; Appendix to Petition p. 7). Prescott's Motion for Reconsideration also casually mentions a "due process equal protection" issue, but this issue has not been raised on appeal. (R1-25, p. 4). Prescott's Motion for Reconsideration also makes a brief statement alleging that the EEOC treated Prescott's charge as timely, but Prescott cited no record evidence or legal authority in support of this statement. (R1-25, p. 4-5; Respondents' Appendix pp. 8a). Finally, under the heading of "Even if . . .", Prescott states in a single sentence, with no citation to record evidence or authority, that "her case was logged into the EEOC computer network on September 19, 1994, and given an EEOC number that date." (R1-25, pp. 5-6; Respondents' Appendix pp. 9a-10a). On April 19, 1994, while Prescott's motion for reconsideration was pending, the EEOC, a non-party, attempted

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4. The district court treated Prescott's motion for reconsideration as a motion to alter or amend the order granting summary judgment under Rule 59(e) of the Federal Rules of Civil Procedure. (R1-34; Appendix to Petition p. 5 n.1).

5. Respondents have included Plaintiff's brief in support of her motion for reconsideration in Respondents' Appendix to establish, as argued below, that Prescott did not properly present to the district court matters raised on appeal.

to file an affidavit in this action to contradict the terms of the Worksharing Agreement relied on by Prescott in opposing summary judgment. (R1-30; Appendix to Petition pp. 6-7). Prescott did not file any affidavit from the EEOC at the time she filed her motion for reconsideration.

On May 23, 1996, the district court issued an order denying Prescott's motion for reconsideration. (R1-34; Appendix to Petition pp. 5-8). The district court noted that Prescott's motion for reconsideration was based on "essentially the same" agency argument under the Worksharing Agreement that Prescott argued in opposition to summary judgment. (R1-34; Appendix to Petition p. 7). The district court concluded that the affidavits "belatedly" submitted by Prescott could not be used to "contradict the clear and unambiguous language of the Worksharing Agreement," which Prescott relied on in opposing summary judgment. (R1-34; Appendix to Petition p. 7). The district court, in its discretion, did not identify or rule on any other issues in denying Prescott's motion for reconsideration.

3. *On Appeal to the Eleventh Circuit*

Prescott thereafter appealed the district court's orders to the United States Court of Appeals for the Eleventh Circuit. The EEOC filed an *amicus* brief before the Eleventh Circuit. In addition to the agency issue argued to the district court based on the Worksharing Agreement, Prescott attempted to argue an "electronic transfer" theory and "equitable tolling" in her brief to the Eleventh Circuit. The Eleventh Circuit, however, declined to address these issues raised for the first time on appeal and affirmed, *per curiam* the district court's orders in a two sentence opinion as follows:

> We agree with the district court for the reasons stated in its dispositive orders of March 20 and May 23, 1996, that appellant's

> Title VII claim is barred. In addition, we find no abuse of discretion in the district court's denial of appellant's motion for reconsideration of the court's March 20, 1996, order granting appellee's motion for summary judgment.

(Appendix to Petition p. 9).

REASONS FOR DENYING THE WRIT

In the Petition, Prescott argues for this Court to grant a writ on three issues: (1) "Worksharing Agreement"; (2) "Electronic Filing"; and (3) "Equitable Tolling." (Petition pp. 11-21).

I.

THE COURT SHOULD NOT GRANT A WRIT TO REVIEW THE DISTRICT COURT'S RULINGS ON THE WORKSHARING AGREEMENT.

A. The Order on Summary Judgment

There is no compelling reason as required by Supreme Court Rule 10 for this Court to review the district court's reading of the language of the Worksharing Agreement at issue in this case. In fact, the terms of the Agreement, which Prescott admits to be unambiguous, establish that RCHRC has no authority to receive charges for the EEOC for alleged employment practices arising outside of Richmond County, Georgia. This Worksharing Agreement, which was introduced and relied on by Prescott, by its own terms, does not extend beyond the territorial boundaries of Richmond County, Georgia.[6] Section 1, Paragraph A of the

6. A copy of the Worksharing Agreement relied on by Prescott is set forth in the Appendix to the Petition beginning on page 39.

Agreement specifically states that the "jurisdiction" of the RCHRC extends only to unlawful employment practices "occurring within Augusta/Richmond County, Georgia." (Appendix to Petition, p. 39). Section 1, Paragraph B of the Agreement specifically limits the scope of the entire Worksharing Agreement "to the extent of the common jurisdiction" of the two agencies. (Appendix to Petition p. 40). Section II, Paragraph B of the Agreement, which pertains specifically to Title VII charges of discrimination, further states that "the [RCHRC] shall take all charges alleging a violation of Title VII . . . where the parties have mutual jurisdiction." (Appendix to Petition p.). Section 2, Paragraph C of the Agreement further clarifies that the agencies will assist each other with charge filing procedures only "to the extent of their common jurisdiction." (Appendix to Petition p. 41). Accordingly, by its own terms, the Worksharing Agreement introduced by Prescott does not grant any authority to RCHRC with regard to charges of employment discrimination allegedly occurring outside of Richmond County, Georgia. It is important to remember that Prescott did not allege in opposing summary judgment or at the reconsideration stage that the Agreement was ambiguous, and she did not offer any extrinsic evidence to contradict the terms of the Agreement at the summary judgment stage. In fact, Prescott admitted in her brief to the Eleventh Circuit that from her "perspective the language of the Agreement was unambiguous." (Prescott Brief p. 23; Respondents' Appendix p. 3a).

It is well settled under Rule 56 of the Federal Rules of Civil Procedure that summary judgment is mandated when the party opposing the motion "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986). It is equally well-settled that a plaintiff may not maintain a lawsuit claiming discrimination under Title VII unless the plaintiff has

filed a charge of discrimination with the EEOC within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1); (Appendix to Petition p. 13). Prescott tried to establish this essential element by relying entirely upon the Worksharing Agreement that she alleged authorized RCHRC to receive her charge as agent for the EEOC. The language of the Agreement, however, does not establish that RCHRC had any authority either from the EEOC or the Richmond County Government to receive her charge which allegedly arose in Columbia County, Georgia. In fact, the Agreement clearly states several times that the scope of the entire Agreement, including the charge filing provisions, is specifically limited to Richmond County, which is the only location where the jurisdictions of the two agencies overlap. The record establishes, therefore, that the only charge of discrimination Prescott filed with the EEOC is the charge received by the EEOC on September 28, 1994, more than 180 days after Prescott's termination. Accordingly, the district court was correct in granting GIW's and KSB's motion for summary judgment, and there is no reason for this Court to grant a writ to review the district court's order.

B. The Order on Reconsideration

There is no compelling need to review the district court's discretionary denial of Prescott's motion for reconsideration. It is well-settled that the decision of a motion for reconsideration is committed to the sound discretion of the district court. *Region 8 Forest Service Timber Purchasers v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993), *cert denied*, 510 U.S. 1040, 126 L. Ed. 2d 651, 114 S. Ct. 683 (1994); *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992). After losing on summary judgment, Prescott filed her motion for reconsideration and submitted an affidavit from Frank Thomas, Director of RCHRC; an affidavit of Sheryl Jones, Office Manager at RCHRC; and an affidavit of John R. Batson, Prescott's counsel in this action. (R1-25; Appendix to Petition p. 7). On May 13, 1996, over a month

later, without explanation or argument, Prescott filed an affidavit of Bernice Williams-Kimbrough, District Director of the EEOC in Atlanta, Georgia. (R1-32; Appendix to Petition p. 7). Prescott offered these affidavits to contradict the language of the Agreement relied on by the district court in granting summary judgment.

The district court properly disallowed Prescott from using the above-referenced affidavits to contradict the Worksharing Agreement that she relied on in opposing summary judgment. (R1-34, Appendix to Petition p. 7). It is well settled in the Eleventh Circuit that extrinsic evidence is not admissible to contradict the language of an unambiguous written agreement. *See Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 702 (11th Cir. 1993). As previously discussed, Prescott never argued that the Worksharing Agreement was ambiguous, and she admitted in her Brief to the Eleventh Circuit that the Agreement is "unambiguous." In fact, Prescott is the party that introduced the Agreement into the record, thereby adopting and admitting the language of the Agreement. Accordingly, the district court was certainly within its discretion when it disregarded the affidavits submitted at the reconsideration stage to contradict the Worksharing Agreement relied on by Prescott in opposing summary judgment.

Even if the district court had allowed plaintiff to introduce these "belated" affidavits at the reconsideration stage, this evidence, which was previously available to Prescott, could not serve as the basis for granting a motion for reconsideration. *E.g.*, *Morgan v. Harris Trust & Savings Bank of Chicago*, 867 F.2d 1023, 1028 (7th Cir. 1989) (parties failure to present evidence at summary judgment stage "prevented its consideration" on his motion for reconsideration); *Englehard Indus. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964) (To justify reconsideration based on additional evidence, moving party is "obliged to show not

only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not have discovered and produced such evidence at the hearing."); *Medley v. Westpoint Stevens, Inc.*, 162 F.R.D. 697, 699 (M.D. Ala. 1995) ("Where a party attempts to introduce previously unsubmitted evidence on a motion to reconsider, the court should not grant the motion absent some showing that the evidence was not available during the pendency of the motion."); *Prieto v. Storer Communications, Inc.*, 152 F.R.D. 654, 655 (M.D. Fla. 1994) ("Evidence which was available to a party during the pendency of a motion for summary judgment may not later be introduced on a motion to reconsider."); *LoSacco v. City of Middletown*, 822 F. Supp. 870, 877 (D. Conn. 1993), *aff'd*, 33 F.3d 50 (2d Cir. 1994) ("A motion for reconsideration cannot be employed as a vehicle for asserting new arguments or for introducing new evidence that could have been adduced during the pendency of the summary judgment motion.").

There is no evidence that the information contained in these affidavits was not previously available to Prescott.[7] To the contrary, the record establishes that this information was available to Prescott prior to the time she opposed the summary judgment motion. In fact, Prescott used an affidavit from Mr. Thomas in opposing summary judgment in this action. (R1-15, Declaration of Frank Thomas). The affidavit of Sheryl Jones states that she has been with RCHRC since 1984. (R1-25, Declaration of Sheryl Jones, ¶ 2). Ms. Williams-Kimbrough's affidavit states that she has been District Director for the EEOC since 1990. (R1-32, Appendix to Petition p. 20). Finally, the affidavit of Mr. Batson, Plaintiff's counsel, did not refer to any newly available evidence. (R1-25, Declaration of John P.

7. Prescott insinuates in the Petition that she was somehow surprised by defendant's arguments pertaining to the limited scope of the Worksharing Agreement. (Petition p. 7). Plaintiff, however, cannot claim to be surprised by the plain language of a document she proffered into evidence.

Batson). Accordingly, the record establishes that the information contained in the affidavits submitted for reconsideration was available at the time the summary judgment motion was pending. This information, therefore, cannot serve as the basis of a motion for reconsideration, which compels the conclusion that the district court did not abuse its discretion in disregarding these affidavits and denying Prescott's motion for reconsideration. This Court, therefore, should not grant a writ to review district court's denial of Prescott's motion for reconsideration.

C. The Decisions Below Relating to the Worksharing Agreement do Not Conflict With Prior Decisions of This Court.

Prescott alleges in the petition that the decisions of the district court regarding the Workshare Agreement somehow conflict with the decision in *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982). (Petition p. 11). In *Zipes*, this Court held that a timely EEOC charge was not a jurisdictional prerequisite to bringing a Title VII case in federal court, but is to be construed as a statute of limitations. *Zipes*, 455 U.S. at 393. This case was correctly cited by the district court. (R1-23; Appendix to Petition p. 2). There is no issue in this case with regard to federal court jurisdiction over Title VII actions. To the contrary, the only discussion of jurisdiction in this case relates to the jurisdiction of the RCHRC, and this discussion was necessary for the district court to determine the scope of the Worksharing Agreement relied on by Prescott. There is no support in the *Zipes* decision for Prescott's apparent argument that RCHRC can act beyond its geographic jurisdiction to receive charges. It is axiomatic that RCHRC cannot, by definition, effectively perform any act beyond its jurisdiction, and the Agreement introduced by Prescott established, by its own terms, that this jurisdiction is confined to Richmond County, Georgia.[8]

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8. In the Petition, Prescott tries to make a hair-splitting distinction (Cont'd)

Prescott also insinuates that the district court was obligated to defer to the EEOC's interpretation of the Worksharing Agreement under the authority of *Smiley v. Citibank*, __ U.S. __, 116 S. Ct. 1730, 1733, 135 L. Ed. 2d 25 (1996). *Smiley* states the well settled principle that this Court will "defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in *statutes* they are charged with administering." 135 L. Ed. 2d at 30. (Emphasis added). In the context of this case, this principle would support deference to the EEOC in construing ambiguous provisions of Title VII. *See EEOC v. Commercial Office Products*, 486 U.S. 107, 115, 100 L. Ed. 2d 96, 106-07, 108 S. Ct. 1666 (1988). This action, however, does not involve the construction of any allegedly ambiguous term in Title VII. To the contrary, this case turns on the language in the Worksharing Agreement, and there is no indication in the cited cases that this Court should defer to EEOC's construction of a contract. In fact, the *Petrelle* decision relied on by Prescott in the Petition specifically holds that the EEOC is not entitled to deference in construing a Worksharing Agreement. *Petrelle v. Weirton Steel Corp.*, 953 F.2d 148, 153 (4th Cir. 1991) (In refusing to defer to agency construction of a worksharing agreement, the Fourth Circuit noted, as is true in Prescott's case, that "this case does not ask what the statute allows, but rather what the worksharing agreement succeeds in doing."). In any event, Prescott admits that the agreement is not ambiguous, which would foreclose any issue of deference even if otherwise applicable. Accordingly, there is no conflict with *Smiley* or any other case cited by plaintiff on the issue of deference.

(Cont'd)
between RCHRC's authority to receive charges and its authority regarding "substantive matters relating to jurisdiction." (Petition p. 3). This argument misses the fundamental point that RCHRC has no authority to act in any capacity beyond the territorial boundaries of Richmond County, Georgia. The Worksharing Agreement relied on by Prescott simply recognizes and incorporates this fundamental limitation on RCHRC's power.

Prescott insinuates on page 13 that the district court's reading of the Worksharing Agreement in this action, as affirmed by the Eleventh Circuit, creates a conflict among United States courts of appeal. This is not true. The cases cited by Prescott construing other worksharing agreements between other agencies and the EEOC all involve charges over which both agencies had jurisdiction. *See Ford v. Bernard Fineson*, 81 F.3d 304 (2d Cir. 1996) (Involved New York State Division of Human Rights and charge arose in New York); *EEOC v. Superior Temporary Services, Inc.*, 56 F.3d 441 (2d Cir. 1996) (Involved New York State Division of Human Rights and charge arose in New York); *Petrelle v. Weirton Steel Corp.*, 953 F.2d 148 (4th Cir. 1991) (Involved West Virginia Human Rights Commission and charge arose in West Virginia); *Griffin v. City of Dallas*, 26 F.3d 610 (5th Cir. 1994) (Involved Texas Commission on Human Rights and charge arose in Texas); *Marlowe v. Bottacelli*, 938 F.2d 807 (7th Cir. 1991) (Involved Illinois Department of Human Rights and charge arose in Illinois); *Sofferin v. American Airlines*, 923 F.2d 552 (7th Cir. 1991) (Involved Illinois Department of Human Rights and charge arose in Illinois); *Hong v. Children's Memorial Hospital*, 936 F.2d 967 (7th Cir. 1991) (Involved Illinois Department of Human Rights and charge arose in Illinois); *Worthington v. Union Pacific*, 948 F.2d 477 (8th Cir. 1991) (Involved Nebraska Equal Opportunity Commission and charge arose in Nebraska); *Reynolds Metal Co. v. Rumsfield*, 564 F.2d 663 (4th Cir. 1977) (Involved agreement between OFCCP and EEOC, both of which have nationwide jurisdiction). None of these cases involve a charge arising outside of the geographic territory that an agency is authorized to regulate, and none of these cases otherwise indicate than an agency can accept charges of discrimination arising outside of its jurisdiction. These cases, therefore, are inapposite to the issue of whether RCHRC had the authority to receive charges of discrimination arising in Columbia County, Georgia.

Finally, Prescott argues that the district court's decision regarding the particular Worksharing Agreement at issue in this case will have a widespread, devastating impact on all EEOC worksharing agreements. To the contrary, the EEOC drafted this Agreement, including the language limiting the scope of the Agreement to Richmond County, Georgia, and the EEOC and RCHRC can change the Agreement at any time. The fundamental problem, however, with Prescott's argument on this issue is that there is no indication from the ordinance creating the RCHRC that it could agree to accept charges outside of Richmond County even if it wanted to. Even the few extracted sections of the ordinance cited in the Appendix to the Petition make clear that the "Board of Commissioners of *Richmond County*" created the "Human Relations Commission *for the County of Richmond*" and gave it power only to "Investigate and study complaints, problems and specific situations arising . . . *in the County* . . . ." (Appendix p. 19) (Emphasis added). As previously discussed, the EEOC and RCHRC explicitly recognized and adopted this fundamental territorial limitation on the authority of RCHRC in the unambiguous language of the Worksharing Agreement at issue in this case.

The facts presented to the district court, therefore, establish that the district court was correct in finding that the RCHRC had no authority to receive charges on behalf of the EEOC beyond the territorial boundaries of Richmond County, Georgia, and the district court did not abuse its discretion in denying Prescott's motion for reconsideration. These decisions were properly affirmed by the Eleventh Circuit. In addition, Prescott has presented no basis for this Court to review these decisions, and the writ should be denied as to Prescott's "Worksharing Agreement" issue.

II.

THE COURT SHOULD NOT GRANT A WRIT ON PRESCOTT'S ELECTRONIC FILING ISSUE.

A. Prescott Did Not Properly Present This Electronic Filing Issue to the Trial Court and the Eleventh Circuit Declined, in Its Discretion, to Consider This Issue for the First Time on Appeal.

It is undisputed that Prescott did not argue or even mention her theory of "electronic filing" to the district court during the summary judgment stage in this action. Electronic filing is not mentioned in Prescott's Brief in Opposition to Summary Judgment. (R1-14). Rather, Prescott alleged in her Eleventh Circuit brief that the materials submitted with her Motion for Reconsideration "addressed the electronic filing issue." (Brief of Appellant, p. 5). Prescott now tries to obfuscate this admission by stating in the Petition that, at the reconsideration stage, she "submitted further evidence to expand on the EEOC computer based filing." (Petition p. 8). Prescott, however, does not allege in the Petition to have addressed electronic filing in opposing summary judgment before the district court, and she does not and cannot cite any record evidence on this point. (Petition p. 6-8).

While Prescott does allege to have presented the electronic filing issue to the district court at the reconsideration stage, the record establishes that she did not mention or otherwise discuss "electronic filing" in her Brief in Support of Motion for Reconsideration. (R1-25; Respondents' Appendix pp. 5a-10a). The only sentence contained in Prescott's Brief in Support of Motion for Reconsideration that could even remotely be construed to address electronic filing is the one sentence under the heading of "Even if . . .", which states as follows: "Even if

the HRC is not an agent, the new evidence shows that the case was logged into the EEOC computer network on September 19, 1994, and given an EEOC number that day." (Respondents' Appendix p. 9a-10a). Prescott did not cite or discuss any record evidence to support this statement. More importantly, Prescott did not cite a single legal authority to the district court that this statement, even if true, would establish that a "charge" of discrimination, as required by Title VII and applicable regulations, had been filed with the EEOC. *See First Alabama Bank v. First State Ins. Co., Inc.*, 899 F.2d 1045, 1060 n. 8 (11th Cir. 1990) ("passing reference" in brief not sufficient to preserve an argument for appeal). Prescott was obligated to fairly articulate and press this argument to the district court to preserve this issue for review, and she failed to do so. The district court is not obligated to sift through the entire record on reconsideration to identify and rule on arguments that may have been available but were not made in Prescott's Motion for Reconsideration. *Restigourhe, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213 n.5 (11th Cir. 1995) (party cannot rely on court to "distill every argument that could be made based on the materials before it . . ."). Accordingly, Prescott's electronic filing argument was not properly presented to the district court and it was certainly not an abuse of the district court's discretion, at the reconsideration stage, to decline to address this unarticulated issue.

Likewise, the Eleventh Circuit did not abuse its discretion in declining to address for the first time on appeal Prescott's electronic filing theory. The Eleventh Circuit follows the general rule that it will not consider on appeal arguments that were not properly presented to the district court. *See Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991) ("We have long held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court."). Only in demonstrated exceptional circumstances will the Eleventh

Circuit exercise its discretion to depart from this general rule. *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir. 1984). Prescott does not challenge this principle in the Petition. Accordingly, the Eleventh Circuit was well within its discretion to affirm the district court's discretionary order denying reconsideration without addressing this issue that was not properly presented to or otherwise ruled on by the district court.

B. Prescott's Electronic Filing Theory is Meritless.

Even if this Court were to consider, *sua sponte*, Prescott's electronic filing argument, this theory is meritless as a matter of law. Prescott alleges that she filed her charge of discrimination with RCHRC, and an RCHRC employee entered a charge reference number into an EEOC computer network (Petition p. 18). The EEOC, in its amicus brief, refers to this procedure as "electronic transmittal." (EEOC Amicus Brief, p. 20). The EEOC admits, however, that the transfer to the EEOC of Ms. Prescott's charge of discrimination was not complete "until after the statute of limitations had expired," which is when the EEOC received Prescott's "paper charge" on September 28, 1994. (EEOC Amicus Brief, pp. 4-5, 20).

Prescott and the EEOC have not and cannot cite any legal authority supporting their argument that the mere entry of a number in an EEOC computer network constitutes filing a charge of discrimination with the EEOC as required by Title VII and applicable regulations. To the contrary, Title VII specifically mandates that "charges shall be in writing . . . and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b); (Appendix to Petition p. 12). In keeping with this statutory mandate, EEOC regulations explicitly confirm that "a charge shall be in writing." 29 C.F.R. § 1601.9; (Appendix to Petition p. 14). EEOC regulations further

state that a charge of discrimination should contain, among other things, the full name and address of the charging party and employer and a statement of facts pertaining to the alleged discrimination. 29 C.F.R. § 1601.12; (Appendix to Petition pp. 14-15). Furthermore, the EEOC regulations specifically provide that a charge of discrimination may only be "made in person or by mail." 29 C.F.R. § 1601.8. In fact, Prescott admits in the Petition that "there is no suggestion that the paper charge can be eliminated, as the statute would seem to prohibit it." (Petition p. 18). Accordingly, both the statutory mandate of Title VII and EEOC regulations would preclude Prescott's electronic filing theory even if it had been properly presented to the district court.

C. Prescott Has Not Stated Any Valid Reason to Justify a Writ on the Electronic Filing Issue.

Prescott argues in the Petition that "if the state and local agencies cannot be mutual agents by the language of the Workshare Agreements, then this issue of first impression takes on importance or (sic) monumental proportions." (Petition p. 17). This argument indicates a fundamental misunderstanding of the district court's orders. There is no ruling in this case that state and local agencies cannot be agents for the EEOC under worksharing agreements. The district court simply held that the agency relationship created by the plain language of the Agreement at issue in this case did not extend to Prescott's charge arising out of Columbia County, Georgia. The district court did not disturb the effectiveness of the Agreement within its expressly defined scope of Richmond County, Georgia. Instead of disturbing the Agreement, as suggested by Prescott, the district court simply applied the Agreement according to its unambiguous language.

In a final effort to attach "great importance" to this issue, Prescott states that "one could argue that the district court and

the Eleventh Circuit rejected the use of computerized information." (Petition p. 20). Of course, this argument is fundamentally inconsistent with Prescott's underlying argument that the district court erred because "the Order did not address the electronic filing issue." (Petition p. 10). In any event, as acknowledged by Prescott, it is the words of Congress in Title VII that require all charges filed with the EEOC to be "in writing" and EEOC regulations mandate what this written charge must contain. Even the EEOC admits, as it must, that the filing of Prescott's charge was not complete until the EEOC received her written charge on September 28, 1995. (EEOC Amicus Brief p. 4-5). Prescott, with the assistance of counsel, had 180 days to satisfy these requirements, and she failed to do so.

In summary, it is undisputed that Prescott did not address electronic filing in opposing summary judgment. Furthermore, Prescott did not properly present this issue at the reconsideration stage and the district court did not abuse its discretion by not ruling on this issue. Likewise, the Eleventh Circuit did not abuse its discretion by not considering this issue for the first time on appeal. Furthermore, Prescott's arguments regarding the "great importance" of this issue are meritless and unsupported by the record. Accordingly, this Court should decline to issue a writ on the electronic filing issue.

III.

THIS COURT SHOULD NOT GRANT A WRIT ON PRESCOTT'S EQUITABLE TOLLING ARGUMENT.

A. Prescott Did Not Argue or Otherwise Present Equitable Tolling to the District Court.

Prescott and the EEOC attempted to argue equitable tolling for the first time on appeal before the Eleventh Circuit. Prescott,

however, does not and cannot give any record citations when Prescott presented and argued this issue to the district court at the summary judgment stage or at the reconsideration stage. In fact, Prescott's Brief in Opposition to Summary Judgment and Brief in Support of Motion for Reconsideration do not make a single reference to equitable tolling. (R1-14; R1-25). GIW and KSB cited controlling authority in its Reply to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment specifically foreclosing any chance for an equitable tolling argument in this action, and Prescott still declined to raise and address this issue in her subsequent Motion for Reconsideration. (R1-19, pp. 5-6). Accordingly, the record in this action establishes that Prescott did not present the issue of equitable tolling to the district court.

While Prescott declines, as she must, to directly state in the Petition that she argued equitable tolling to the district court, she does insinuate that the issue was raised by her mere citation of two cases to the district court. (Petition pp. 22-23). First, plaintiff says she cited *Williams v. Washington Metro Area Transit Authority*, 721 F.2d 1412 (D.C. Cir. 1983) in her brief in opposition to summary judgment. Prescott cited this case, however, in her agency argument based on the Worksharing Agreement. Plaintiff's discussion of this case did not mention equitable tolling in any way. (R1-14; Respondents' Appendix p. 12a-13a). Prescott also alleges that she brought up equitable tolling at the reconsideration stage by citing *Brown v. Crowe*, 963 F.2d 895, 900 (6th Cir. 1992). Again, however, Prescott's citation and discussion of this case related entirely to her agency argument, and she did not mention equitable tolling in any way. (R1-25; Respondents' Appendix p. 7a). Accordingly, Prescott has not and cannot give a single citation to the record in this action, much less to her Appendix to the Petition, where equitable tolling was mentioned in any way to the district court. If, as argued in the Petition, "Plaintiff's arguments directly

confronted the need for tolling" and that this case "cried out" for this theory, it is certainly reasonable to conclude that Plaintiff's counsel consciously decided not to argue or even mention this theory to the district court. Clearly, therefore, there was no error or abuse of discretion by the district court by not ruling on this unpresented matter, and the Eleventh Circuit did not abuse its discretion by not addressing this issue for the first time on appeal.

B. Prescott's Equitable Tolling Argument is Meritless.

Even if Prescott had properly raised this issue, the record establishes that equitable tolling would not apply. It is undisputed that Prescott was represented by counsel before the expiration of the 180-day deadline for filing her charge of discrimination, and her counsel specifically handled the filing of her charge of discrimination with RCHRC. (Prescott Tr. pp. 215-16; R1-15, Plaintiff's Response to Material Fact ¶ 7-8). Equitable tolling does not apply to filing a charge of discrimination when the charging party is represented by counsel. *Edwards v. Kaiser Aluminum and Chemical Sales*, 515 F.2d 1195, 1200 n. 8 (5th Cir. 1975) (equitable tolling "singularly inappropriate" where plaintiff retained counsel "long before 180-day period ran"); *Freeman v. CSX Transportation*, 730 F. Supp. 1084, 1086-87 (M.D. Ala. 1989) ("equitable tolling is particularly inappropriate when Plaintiff has consulted counsel during the statutory period"). Accordingly, the record establishes that equitable tolling cannot apply in this case.

C. Prescott Has Not Stated Any Valid Reason to Justify a Writ on the Equitable Tolling Issue.

Prescott does not allege any split among the circuits on this issue, and, contrary to Prescott's argument, this principle is not in conflict with this Court's decision in *Zipes v. Trans World*

Airlines, 455 U.S. 385 (1991). In fact, the fundamental principle recognized by this Court as the reason for equitable tolling in the Title VII context is to assist "laymen, unassisted by trained lawyers". . . . *Zipes*, 455 U.S. at 397 (citing *Love v. Pullman*, 404 U.S. 522, 527 (1972).

The EEOC's brief to the Eleventh Circuit, which is adopted by Prescott, cited cases discussing equitable tolling in situations where the EEOC made an administrative error. (EEOC Amicus Brief p. 19). The EEOC's discussion of this issue, however, contained no citations to the record in this action, and there is no record evidence that the EEOC or any other agency made any error affecting the timely filing of Prescott's charge. Prescott's counsel filed her charge of discrimination with the wrong agency, and the EEOC did not receive Prescott's charge until after the statute of limitations ran. (EEOC Amicus Brief p. 20). As discussed above, equitable tolling cannot apply to cure this defect because Prescott was represented by counsel who specifically handled the filing of her charge of discrimination.

Accordingly, the district court did not err or abuse its discretion in any way by failing to address equitable tolling at either the summary judgment stage or at the reconsideration stage because this issue was not presented by Prescott and is patently meritless. The Eleventh Circuit did not abuse its discretion in refusing to consider this issue for the first time on appeal. Prescott has not identified any reason for this Court to issue a Writ on this issue and the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

ROBERT O. SANDS
Counsel of Record
C. GARNER SANFORD, JR.
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
Attorneys for Respondents
1201 West Peachtree Street, N.W.
Suite 3800
Atlanta, Georgia 30309
(404) 881-1300

APPENDIX A — EXCERPTS FROM BRIEF OF APPELLANT NANCY PRESCOTT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELEVENTH CIRCUIT NO.
96-8545

NANCY PRESCOTT,

Plaintiff-Appellant,

v.

G.I.W. INDUSTRIES, INC., and KSB AMERICA COMPANY,

Defendants-Appellees.

BRIEF OF APPELLANT

On Appeal from United States District Court
for the Southern District of Georgia
Civil Action No CV195-44

* * *

[5] the District Court abused its discretion in not considering the evidence Plaintiff submitted. The District Court denied the reconsideration, saying it was simply the same argument. Plaintiff asserts the evidence submitted in the reconsideration supplemented prior apparent agency evidence and addressed the electronic filing issue.

During the pending reconsideration, the EEOC filed for

leave to file an affidavit by Bernice Williams Kimbrough. (R1-29). The affidavit of Bernice Williams Kimbrough shows that at ¶17, from the records of the RCHRC and EEOC, the date the RCHRC electronically notified the EEOC that it was administratively transferring the file to the ATDO was 9/19/94. At ¶18 of the Kimbrough Affidavit it shows in the last column that the ATDO notified the RCHRC on September 23, 1994 that the ATDO was in electronic receipt of the charge. (R.1-30-¶18). The record reflects that the EEOC paid $50.00 to the RCHRC and that the EEOC treated charge 11A-94-098 as timely filed. (R.1-30). By inference, the manner in which it was processed, both agencies believed the charge was timely, if not, then the agency has to act accordingly. There is no evidence to show that the agencies did not believe the charges were timely filed. On May 23, 1996 the District Court denied the reconsideration. (R.1-34). Notices of appeal were filed on April 19, 1996 (R.1-28) and May 24, 1996 (R.1-35).

Statement of Facts

This is an appeal from the grant of summary judgment to the [6] defendant employer, GIW Industries ("GIW"), in a Title VII case. GIW argued, and the district court agreed, that the plaintiff, Nancy Prescott, had not filed a timely charge. According to Defendants, Prescott filed her charge 174 days after her termination, but she filed with the Richmond County Human Relations Commission ("RCHRC"), a local FEP agency that did not have geographic jurisdiction to investigate, have a hearing and actively otherwise reconcile her charge because the termination occurred at an employer in a different county. There is no local or state FEP agency with active jurisdiction over claims arising in the County of Prescott's former employer, the defendant.

Appendix A

No direct attack was made on the agency theory, vis a vis the worksharing agreement, until Defendants response brief. It was however done by argument in a footnote in the opening brief.

No agency evidence was submitted to contradict the evidence from plaintiff, from which it could be inferred that the agencies treated the charge as timely.

In accordance with the worksharing agreement between the RCHRC and the EEOC, the RCHRC received the filing on 9/15/94, 174 days after termination. The RCHRC transmitted Prescott's charge to the EEOC on 9/19/94 (R.1-25-Jones ¶13; R.1-30). The charge was received electronically at the EEOC's headquarters in Washington, D.C. on the 178th day after Prescott's termination (R.1-30-¶17; Ex. A; Brief of EEOC), and subsequently transmitted to the Atlanta District Office on the 182nd day (R.1-30-¶18). (Brief of EEOC).

* * *

[23] (11th Cir. 1990).

The unrebutted inferences from the record about the nature of the longstanding relationship, whereby the EEOC and the RCHRC acted as agents for one another for accepting filings cannot be disregarded because of language the District Court found conflicting in the agreement.

From Plaintiff's perspective the language of the Agreement was unambiguous, that the agency relationship was created. Language about jurisdiction relates more to substance as to investigation, and ought not be an impediment to a clear

statement of an agency relationship, and an otherwise efficient system to begin the processing of charges for substance, as it relates to determinations of timely filings.

(2) Whether the electronic transfer of a charge from an FEP agency to the EEOC constitutes filing of a charge with the EEOC, thereby making the charge at issue timely filed?

Plaintiff adopts the arguments of the EEOC on this matter.

When the Defendants filed their motion for summary judgment they did not assert that an electronic filing was not timely. (Defendants Statement of Material Facts; R.1-12). The sole fact upon which they based their defense was that the EEOC did not stamp received on the copy the EEOC was sent until after the running of the 180 days.

The Plaintiff submitted evidence as part of the reconsideration from which it was shown that the HRC entered or filed the charge into the EEOC system on 9/19/94. (R.1-25-Thomas . . .

* * *

APPENDIX B — BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CIVIL ACTION NO.
CV195-044

NANCY PRESCOTT,

Plaintiff,

v.

G.I.W. INDUSTRIES, INC., and KSB AMERICA COMPANY,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

The Defendants were the movants in a motion for summary judgment. It was their burden to show, as a matter of undisputed material fact, that Plaintiff could not show any theory or facts which would make the filing timely, under appropriate law, in light of the rule that all inferences and evidence was to be viewed in the light most favorable to the Plaintiff.

The burden on the Defendants was to negate, that is to show, that it was not possible that an agency relationship existed, explicitly or implicitly, for the acceptance of filings by the RCHRC. More directly, the Defendants has to show that an agency relationship for receiving filings indisputably could not

exist. Yes, the RCHRC can only investigate and attempt to concilliate disputes where the employer is within Richmond County. However, the Workshare Agreement refers not just to the jurisdiction of conciliating or investigating charges, but to the filing of charges. As is discussed below neither the EEOC nor the HRC have the discretion, or jurisdiction, to reject the filing of a charge. To that extent, the fact that the Workshare agreement deals with jurisdiction on substantive concilliation does not indisputably show that the Workshare Agreement does not grant a reciprocal agency relationship as to filings.

Agnecy [sic]

Standard agency law alone, without the remedial reading of Title VII required by Supreme Court jurisprudence, compels a reading of the Workshare Agreement, that notwithstanding the language used by the Court, the Agreement also has a reciprocal appointment for filings.

The capacity to be a principal depends on whether the act to be done by the agent is within the capacity of the principal if he were present. § 28 Agency CJS. A corporation may serve as agent for another corporation. *United Bonding Ins. Co. v. Banco Luizo-Pamameno,* S.A., 422 F.2d 1142 (5th Cir.). A basic rule of agency is that whatever a person may do himself, he may do through an agent. Likewise, a person capable of acting for himself may act as an agent fore another, but a person may act as agent for others although he is incapable of acting for himself. *Sims v. Slovin,* 207 A.2d 597, 603, aff'd, Sup. 213 A.2d 903. The creation of the relation of principal and agent rests in the intention of the parties which may be express or implied and need not be a conscious intention, but may be determined from the facts and circumstances or a particular case. § 38 Agency.

Appendix B

One acting by another is acting for himself. § 4(b) Agency. In an agency relationship the principal is the party for whom another acts and from whom he derives his authority to act.

There is no rule of construction which prohibits an interpretation of the Workshare Agreement consistent with the reciprocal appointment for filing notwithstanding the limitations on jurisdiction for concilliation.

The declarations originally submitted by Frank Thomas and Louise Dirrette show that filings were accepted by the RCHRC as a matter of course. Submitted herein are declarations that the RCHRC has for over a decade been an agent of the EEOC for preparing and accepting charges for filing, and that in fact, the EEOC pays them to act as their agent, in such cases where the employer is located outside Richmond County. The Declaration of Sheryl Jones show that in 1994 the RCHRC was a agent for the EEOC and the RCHRC had an EEOC computer as a part of the EEOC computer network for logging in cases in the EEOC system including those where the employer is outside Richmond County. The Declarations submitted herein reflect that the RCHRC has been holding itself out to the public as an agent for the EEOC for the purpose of timely filing of complaints, even in cases where the employer is located outside Richmond County. *Brown v. Crow*, 963 F.2d 895, 900 (6th Cir. 1992) (deferral agency mistake in applying Workshare Agreement not held against claimant).

In its order, the Court relied exclusively on the interpretation of the Agreement. Because this was a motion for summary judgment, the only way the Defendants could have won, using the Court's analysis, was if the Workshare Agreement and the Richmond County Ordinance creating the RCHRC precluded

the RHRC from being in the business of accepting charges where the employer is in another County. There was nothing in this record, which when construed in the light most favorable to the Plaintiff and consistent with agency principles and the rules of construction of filing timeliness by the Supreme Court, which precluded RCHRC from being an agent of the EEOC for the purpose of receiving filings in cases of possible discrimination where the employer is located outside Richmond County. While it is true that the 1981 ordinance creating the RCHRC limits its "investigatory" powers to Richmond County (Section 14(i)), the RCHRC can "(j) Receive, initiate, investigate and pass upon complaints alleging discrimination in employment . . . because of . . . sex . . . or age." (Section 14(j).

Due Process Equal Protection
Requires Participation of EEOC

The EEOC was created by Congress to resolve disputes relating to discrimination. The EEOC has a vested interest in this case and should be allowed to participate, and should be notified of the need to participate.

Undisputed Evidence of
Timely Filing

The EEOC considered the charge timely filed. On the "Notice of Right to Sue". The EEOC did not indicate that the complaint was not timely filed. The question of whether a complaint is timely filed, on acceptance, is first determined by the EEOC. The EEOC must make a determination of whether a charge is timely filed so it does not waste what little resources it has. If the charge were not timely filed another type of Notice of Right to Sue would have, or should have, been provided.

Appendix B

Neither Agency has the Jurisdiction or
Discretion Not to Accept Filings

There is a major distinction between the jurisdiction to "accept" filings and the jurisdiction to do the processes of investigation and reconciliation.

To the extent of their "common jurisdiction" each may investigation and try to conciliate employment problems where the employers are within Richmond County.

However, the EEOC has no discretion not to accept any filing made with it.

To that extent, when the RCHRC acts as an agent of the EEOC, in matters of accepting filings it is without discretion to reject or not accept a filing.

It is like Court, which must accept the filing.

Note in paragraph II.B., the RCHRC is to refer charges to the EEOC, "so long as the allegations meet the minimum requirements of those Acts."

Other terms of the Workshare Agreement require the HRC to send documents to the EEOC within two days.

The Defendants have not shown that the HRC informed the Plaintiff that the HRC was not the right place to file.

Even If . . .

Even if the HRC is not an agent, the new evidence shows

that the case was logged into the EEOC computer network on September 19, 1994, and given an EEOC number that day.

Respectfully submitted this 3rd day of April, 1996.

s/ John P. Batson
John P. Batson
Ga. Bar No. 042150
Attorney for Plaintiff

Prepared by:

John P. Batson
303 Tenth Street
P.O. Box 3248
Augusta, GA 30914-3248

(706) 737-4040

APPENDIX C — EXCERPTS FROM PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civ. Act. No.
195-044

NANCY PRESCOTT,

Plaintiff,

v.

G.I.W. INDUSTRIES, INC., and KSB AMERICA COMPANY,

Defendants.

PLAINTIFFS' BRIEF
IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The defendants raise administrative law principles to assert the complaint should be dismissed, alleging the administrative EEOC charge was not timely filed with an appropriate agency (Issue I), and that although GIW was named in the administrative complaint, because KSB was not also named, KSB should be dismissed. (Issue II).

Appendix C

PLAINTIFF TIMELY FILED A CHARGE OF GENDER DISCRIMINATION

Plaintiff alleged she was terminated on March 25 or 28, 1994, depending upon whether one uses the date she knew, or the company knew. Assuming the earlier date, then if Georgia is a deferral "state", then Plaintiff had to file her complaint within 300 days with the EEOC, or within 180 days (or September 22, 1994), if Georgia is a nondefferal state.

The defendants have taken the position that because the Richmond County Human Relations Commission has no jurisdiction to investigate claims in Columbia County that this makes the "state" [2] a nondeferral state. This is not necessarily so, but as is shown by the discussion below, does not matter at this point.

Even assuming that Georgia is a non-deferral state, the complaint was timely filed, because it was filed on September 15, 1994, with the Richmond County Human Relations Commission, (hereafter HRC) because a Worksharing Agreement between the EEOC and the HRC makes one the agent of the other for purposes of accepting filed charges. The HRC is a Section 706 "Notice Agency" with a workshare agreement with the EEOC. 29 C.F.R. § 1601.74. Workshare agreements between the EEOC and state deferral agencies usually provide that a filing with the EEOC or state fair employment agency is a filing with the other agency. Courts have upheld these agreements where the local agency and the EEOC have a contract or agreement. See e.g., *Williams v. Washington Metro. Area Transit Auth.*, 721 F.2d 1412 (D.C. Cir. 1983) (with a workshare agreement, a filing with the deferral agency constitutes a filing with the EEOC even if it was never forwarded to the EEOC

because the state agency is an apparent agent of the EEOC). If the EEOC were not able to contract with local agencies to accept filing the purpose of the EEOC would be stiffled unless the EEOC were wastefully huge and had branches of its agency in every geographic region around the country.

The 1994 Worksharing Agreement between the HRC and EEOC is attached to the Declaration of Frank Thomas the Director of the HRC. Exhibit A. The HRC-EEOC Worksharing Agreement for Fiscal Year 1994 (which runs from October 1, 1993 through September . . .

* * *